Canadian Centre
for Foreign Policy
Development

Centre canadien
pour le développement
de la politique étrangère

125 promenade Sussex Drive, Ottawa, Ontario K1A 0G2
Telephone/Téléphone : 613.944.8278 Fax/Télécopieur : 613.944.0687

THE INTERNATIONAL COURT OF JUSTICE OPINION ON THE LEGALITY OF THE USE OR THREATENED USE OF NUCLEAR WEAPONS

Debbie Grisdale
Physicians for Global Survival

March 6-7, 1997

1008.9E

Department of Foreign Affairs and International Trade
Ministère des Affaires étrangères et du Commerce international
Canada

Canadian Centre
for Foreign Policy
Development

Centre canadien
pour le développement
de la politique étrangère

125 Sussex Dr. Ottawa, Ontario K1A 0G2

104-00011/

THE INTERNATIONAL COURT OF JUSTICE OPINION ON THE LEGALITY OF THE USE OR THREATENED USE OF NUCLEAR WEAPONS

Debbie Grisdale
Physicians for Global Survival

March 6-7, 1997

1008.9E

ISBN: 0-662-30608-2
E2-374/1997E

Tel.: (613) 944-8278
Internet address: http://www.cfpd.ca Fax: (613) 944-0687

Debbie Grisdale for Physicians for Global Survival on
The International Court of Justice Opinion on the Legality of the
Use or Threatened Use of Nuclear Weapons

SUMMARY

During a one and one half day seminar on March 6/7 1997 fifty participants including scholars in international law, representatives from peace and disarmament organizations, students and government officials met to consider the implications of the July 8 1996 opinion of the International Court of Justice (ICJ) for Canadian policy. The seminar was organized into four sessions:

Overview of the World Court Ruling
NATO/Allied Nuclear Policy and the World Court Ruling
Applying the World Court Ruling to Canada
Conclusions and Looking to the Future

Each session opened with two presentations and then was followed by a period of questions and discussions with the presenters and participants.

Session 1
Overview of the World Court Ruling
Presenters: Roger Clark, Professor of Law, Rutgers University and presented Samoa during the ICJ oral hearings; Jennie Hatfield-Lyon, Professor of Law at Queens University and the University of Western Ontario

Prof. Roger Clark began the seminar by providing an overview of the case's history and judgement. In its opinion the Court determined that states do not have a "green light" to use nuclear weapons. Conversely, it recognized that there were "no prohibitions as such" against nuclear weapons. He explained that the "as such" in the clause refers to the requirement for proportional use of nuclear weapons. The prohibition becomes effective where the nuclear threat is disproportionate to the situation. Clark argued that would always be the case given the vast destructive power of nuclear weapons.

In the remaining sections of the Opinion, the Court declared while nuclear weapons are generally illegal, it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in the "extreme circumstance of self defence in which the very survival of a State would be at stake."

Professor Hatfield-Lyon carefully reviewed the logical pyramid created by the International Court and noted that ten out of the fourteen Judges voted in favour of the general illegality of the use and the threat of use of nuclear weapons. Her presentation proposed future steps that might

be taken to enable nuclear disarmament. She noted the Court's Advisory Opinion obliges all states to conclude `negotiations leading to nuclear disarmament....under strict and effective international control.'

Session 2
NATO/Allied Nuclear Policy and the World Court Ruling
Presenters: Commander Rob Green RN (Ret'd) current Chair of the World Court Project in the UK ; Yves Le Bouthillier, Professor of International Public Law and International Protection of the Person at the University of Ottawa

After examining NATO policy since 1989 Commander Rob Green (Ret'd) stated it is clear that the Alliance has no intention of renouncing nuclear weapons. It will continue to maintain strategic and sub-strategic nuclear weapons for the foreseeable future as it believes that they play an essential stabilizing role in Europe; guard against uncertainties and provide a hedge against the possible re-emergence of substantial military threats, most likely to come from North Africa and the Near and Middle East.

In light of the ICJ opinion, Green believes that aspects of NATO's current nuclear weapons policy are vulnerable to legal challenge. These include: NATO's option of first use; plans by the three NATO nuclear states to use nuclear weapons against non-nuclear recalcitrant states to counter the proliferation of weapons of mass destruction or to protect US/UK/French "vital interests"; deployment of ballistic missile submarines on so-called deterrent patrols; NATO nuclear umbrella doctrine and; current NATO opinion that nuclear might is right.

Prof. Yves Le Bouthillier claimed that NATO's position that the ICJ decision is only an opinion and therefore not binding , is invalid. In light of the decision, he asserted both NATO and Canada need to study the opinion and clarify their existing policies.

He continued by explaining that different interpretations of the opinion exist. The most common is that the Court determined the use of nuclear weapons illegal but could not determine whether this was so when the very existence of the state is threatened. Le Bouthillier noted the Court was innovating in describing the "survival of the State" concept. The principle was considered dangerous in the 19th century. Despite the possible scenarios that this interpretation raises, the decision makes most uses of nuclear weapons illegal.

The second less common interpretation of the opinion, is that nuclear weapons can be used not only when survival of the State is at stake, but also when their use would be in keeping with humanitarian law. This interpretation provides no indication of what the threshold of horror would have to be to justify this action.

Prof. Le Bouthillier suggested that the principle of reasonable possibility of persecution that exists within refugee law be extended to allow humanity the benefit of living in a world in which nuclear arms are illegal.

Session 3
Applying the World Court Ruling to Canada
Presenters: Peter Weiss, a distinguished American peace activist, practising lawyer, professor of law and Co-Chair of the International Association of Lawyers Against Nuclear Arms (IALANA); Scott Fairley, practicing lawyer, past-President of the Canadian Council on International Law

Prof. Peter Weiss stressed the Court's acknowledgement of the unique nature of the effects of nuclear weapons and the fact that any use or threat of use of these weapons must comply with the principles of proportionality. He noted the Court's requirement that methods and means of warfare must distinguish between civilian and military targets and must avoid causing unnecessary suffering to combatants. Prof. Weiss noted that the principle of necessity cannot justify civilian casualties. The Court may allow an exception to the general rule of illegality in an extraordinary situation - perhaps for a mini-nuke in the Gobi Desert.

Weiss suggested that implications of the decision for Canada be examined in the context of Canadian involvement in nuclear war preparations. He made reference particularly to Canada's role in NATO's nuclear planning group and Canadian participation in NORAD.

Scott Fairley stated that the decision of the Department of Foreign Affairs to refer the Court's opinion to the Standing Committee on Foreign Affairs and International Trade (SCFAIT) appears to indicate that the Government views the opinion as a matter of policy, not law. Parliament must ensure that Canadian policy is adjusted to conform to international law.

In discussing binding versus advisory opinions both Weiss and Fairley stated that the Advisory Opinion ought not to be dismissed lightly. Despite being called an "Advisory" Opinion, the opinion must be regarded with the greatest of care as it is rendered by the highest tribunal in the world for the interpretation of international law. The UN General Assembly asked for the opinion and, after receiving it, did not declare that political factors outweigh legal considerations. Discussion ensued concerning the possibility of taking the Government of Canada to court for failure to comply with the decision of the ICJ.

Session 4
Conclusions and Looking to the Future
Presenters: Tom Keating Professor of Political Science, the University of Alberta; Douglas Roche former Canadian Ambassador for Disarmament

Professor Keating described this point in time as an interesting juncture in NATO's history and that a decision has been made "from the top down" to take NATO's nuclear mandate into the emerging era. He reminded participants that NATO was not always a nuclear body, and that Canada had strong reservations about going nuclear in the 1950s. It is now time for a decision "from the bottom up" on whether and how NATO can serve the interests of peace.

In the final session, Douglas Roche summarised the various points of consensus from the

meeting. These were:

- the ICJ opinion has determined that the use and threat of use of nuclear weapons is constrained by humanitarian law

- the opinion has shifted the burden of proof of the legality of nuclear policies onto the nuclear states

- lawyers and judges are `nitpicking' the finer points of the decision. The ICJ demanded a conclusion of negotiation on nuclear disarmament. The problem now is there is no enforcement of their decision so it has returned to the political arena. Citizens must now push governments to accept their obligations under international law to honestly pursue negotiations towards disarmament.

- the ICJ opinion has required the international community to negotiate a convention for the complete elimination of nuclear weapons. As a consequence, the nuclear abolition movement is now legitimized. Roche stated "It is not a dream, it is a commanding reality in light of current international law."

- some Nuclear Weapons States are not only ignoring the ICJ opinion but flouting it by continuing to claim nuclear weapons are essential

- the legal obligations resulting from the ICJ opinion must take political form. We need systematic progress toward nuclear disarmament defined within a comprehensive framework.

In his concluding comments Ambassador Roche proposed that the Canadian government review the Nuclear Weapons Convention which will be released during the NPT PrepComm; immediately ask for clarification of NATO's policy, seek a formal public debate on this issue and push to form a coalition of like-minded states to press for the comprehensive negotiations demanded by the ICJ.

SESSION 1: OVERVIEW OF THE WORLD COURT RULING

Presenters:

Roger Clark, Professor of International Law, Rutgers University. Representative for Samoa before the World Court.

Jennie Hatfield-Lyon, Professor of Law, Queens University and the University of Western Ontario, and practicing lawyer.

Chairperson: Douglas Roche

Professor Roger Clark stated that the major role played by small South Pacific states in bringing the question of the legality of nuclear weapons before the Court would have profound implications for what a larger country like Canada could do. He added that the case also speaks to the obligations and capabilities of professional groups such as lawyers and doctors. Prof. Clark recalled that it had been his own general practitioner in Wellington, New Zealand (Dr. Erich Geiringer), who had educated him to think of nuclear weapons as a medical rather than a strategic issue.

Evidently, many people still think of the nuclear threat in very limited, abstract terms. This was made evident to Prof. Clark when, during a panel discussion the night before the case was to be heard at The Hague, a distinguished human rights activist remarked that the case against nuclear weapons was "silly" -- as it was unrelated to human rights and of no consequence to Europe. The Ambassador from the Solomon Islands had replied to the contrary that since people live in areas where nuclear bombs are tested, the issue for them is the very right to live. European powers also consider the South Pacific "a little piece of Europe", which they despoil at will.

Prof. Clark remarked that the distorted way in which the nuclear issue is framed was captured perfectly by a judge at the Court, who noted that while it is illegal to use a dum-dum bullet against one person, it has not been illegal to drop a bomb that could obliterate hundreds of thousands of people. In this way, international law forms a peculiar kind of spider-web that catches the smaller issues, but allows the larger ones to pass through. The South Pacific states, Prof. Clark said, have faith that international law is capable of resolving the larger issues, and is one of the few means by which small states can be heard.

What did these countries think they could accomplish by appealing to the International Court of Justice (ICJ)? One diplomat had told Professor Clark that he would be an "idiot" to think a World Court opinion could get rid of nuclear arms.

Prof. Clark said he had responded to this remark with the story of a Maori general who had been on the verge of defeating British invaders in New Zealand. Although the British had artillery and modern weapons, the Maori warriors were brilliant tacticians and good fighters. On the eve of a big battle when the British could have been vanquished, however, the Maori general had sex with the wife of a colleague. The word quickly spread, with the result that no soldiers turned up at the battlefield the next day. The general had lost "mani" -- the Maori term for prestige or social standing. Prof. Clark believes the World Court decision may have the same effect. It has caused nuclear weaponry to lose some of its "mani" and forced countries like Canada and Australia to reconsider their roles in the current system.

The World Court was asked to consider two questions. The first was whether the use of nuclear weapons would be a violation of the constitution of the World Health Organization (WHO), the preamble of which refers to the "happiness, harmonious relations and security of all peoples". This question was a natural one for some Pacific states which are members of the WHO, but not the UN General Assembly (UNGA) and which define security almost solely in

environmental terms.

The Court's rejection of the WHO appeal is "very troubling", said Prof. Clark, since, in effect, the Court said that "the WHO can make futile plans to clean up after a nuclear war, but it can't trespass by making incursions into the law."

The second question before the Court was whether the threat or use of nuclear weapons in any circumstance would be permitted under international law.

Prof. Clark stated that many branches of the law had to be consulted to answer this question: human rights law, international law, humanitarian law, UN charters, common law and civil law. One lawyer on the Solomon Islands team had said he believed the whole answer was contained in the 1868 Declaration of St.Petersburg which limits the size of shells that can be fired and outlaws the creation of excessive human suffering and the targeting of civilian populations. "One hundred and thirty years ago people had the same ideas that we are still arguing about," said Prof. Clark.

Prof. Clark then outlined the positions held by all the judges. Only Judge Oda (Japan) concluded that the legality of nuclear weapons ought not to have been brought before the Court because it was not a judicial issue. The Court determined that states did not have a "green light" to use nuclear weapons. Conversely, it recognised that there were no "prohibitions as such" against nuclear weapons. Clark explained that the "as such" in the clause refers to the requirement for proportional use of nuclear weapons. The prohibition becomes apparent in specific situations where the nuclear threat appears disproportionate to the situation -- which arguably could be every case, given the vast destructive power of nuclear weapons.

In the remaining sections of the Opinion, the Court declared that nuclear weapons are generally illegal, but it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in the "extreme circumstance of self defence" in which the very survival of a State would be at stake. In addition, it stated unanimously that "there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control".

The Chair then introduced the second speaker, **Professor Jennie Hatfield-Lyon**. Prof. Hatfield-Lyon began her presentation by calling the World Court opinion on the legality of nuclear weapons the most significant decision affecting many areas of international law since the Nicaragua vs USA case. She believes it will have implications for Canadian policy, and should provide guidance to the UNGA on the inter-relationship between "the great corpus of international law norms" that govern nuclear weapons issues.

Prof. Hatfield-Lyon then reviewed specific aspects of the Advisory Opinion, including its dissenting views. The Court commenced its Opinion by conclusively dismissing the argument proffered by some states that the Court could not grant the UNGA request because the question

involved matters unrelated to the work of the General Assembly. It found that the Assembly was granted specific competence to "consider the general principles . . . in the maintenance of international peace and security", and to "initiate studies and make recommendations for the purposes of . . . encouraging the progressive development of international law and its codification".

Prof. Hatfield-Lyon reported that the Court was unable to arrive at a conclusion concerning the legality of deterrence. It specifically declined to pronounce on the argument put forward by several judges that the practice of a certain number of nations could amount to state practice. Some judges commented on the issue separately. Judge Schwebel stated that the constant readiness of the nuclear weapons machine and the expense involved in its construction lent a customary legal legitimacy to deterrence as an international practice. In contrast, however, Judge Fleischhauer used case law to substantiate his opinion that the long-term adherence to the policy of deterrence by some states does not in itself give the policy the stature of law. In addition, Judge Shi warned that the sanctioning of the practices of a handful of states as law would violate the principle that all 185 UN member states have "sovereign equality".

Prof. Hatfield-Lyon agreed with Prof. Clark that although the Court found no specific authorization for the threat or use of nuclear weapons, nor any comprehensive and universal prohibition of them as such, it declared that their use or threat of use must be proportional to the attack and only invoked when a state is under armed attack. The Court was unable to decide whether the use or threat or use of nuclear weapons in an extreme circumstance of self-defence was lawful or unlawful.

The Court's inability to settle this question contradicted its declaration that nuclear weapons are a special class of weapon with characteristics that are "scarcely reconcilable" with humanitarian law. The Court has suggested that there is a gap in international law that makes it unclear whether the right to self-defence or the principles of international law should prevail. Three dissenting judges took exception to the Court's inability to resolve this issue; one remarked that it is the physical survival of peoples that must be kept in constant view.

The Court returned to more solid common ground when it found tnat nations are under an obligation to negotiate in good faith for nuclear disarmament. Prof. Hatfield-Lyon said while it is possible to put in place treaties banning nuclear weapons -- similar to those that ban chemical and biological weapons -- this achievement would first require significant political work in confidence-building and in creating monitoring systems and enforcement regimes.

Prof. Hatfield-Lyon concluded her presentation by stating that the World Court opinion represents a strong consensus that nuclear weapons are either absolutely illegal (3 judges) or generally illegal (7 judges), and provides the UNGA with the opportunity to clarify the international law governing nuclear weapons.

Prof. Hatfield-Lyon was uncertain about what the political impact of the opinion will be.

On the one hand, Australia and Canada are re-evaluating their own policy in light of the Court's opinion. On the other, however, Russia has thumbed its nose at the Court by announcing (possibly in response to changes in NATO policies) that it will reserve the right to a nuclear strike in the face of a conventional attack. Citizens need to convince governments, such as Canada's, that they have an obligation to act in support of the World Court opinion.

Question/Discussion Period

During the discussion period that followed, a panellist said she was troubled by the proviso that a state could use nuclear weapons if its existence was threatened. How would that threat be defined? Prof. Hatfield-Lyon proposed that the International Law Commission be asked to clarify this question. It is troubling, for instance, that the Opinion might provide justification for a nuclear strike in a case where national borders are threatened by a secessionist movement.

Prof. Clark discussed two additional hypothetical situations. The first, if the ruling had been made before the atomic bomb was dropped on Japan in 1945, it would have made that action illegal. Second, if a state -- for instance, Israel -- was surrounded by neighbouring states that had announced their intention to commit genocide the Opinion would make a nuclear response legal.

Another participant reiterated that the Court opinion states that any use of atomic weapons in self-defence still must conform to the norms of humanitarian law; in particular, that any use of nuclear weapons can't be indiscriminate. As a result, he argued, it might only be legal to use nuclear weapons when under attack from a nuclear submarine -- which is perhaps the only conceivable way of using nuclear weapons against a purely military target. All the current hardware and strategies that target population centres would become illegal. There followed a lengthy discussion on the way the Opinion treats human rights law and humanitarian law, and whether humanitarian law supersedes human rights law in times of war.

Prof. Clark added that he thought the Court defined war in a more narrow, political light. The mere existence of nuclear hardware and strategies did not constitute the threat of using nuclear arms as defined by the Court; rather, there had to be a specific utterance in a specific circumstance.

A law professor said the World Court opinion presents the dilemma of whether "the master's tools can be used to remake the master s house." In other words, can the law successfully address a question if it is based on a certain world view? She also remarked on what she saw as two shortcomings of the Opinion. The first, the dissenting view that the maintenance of the system of deterrence is legal because it has long been agreed upon by a club of nuclear nations. She argued that this is like saying that several people who agree to participate in criminal activity have somehow risen above the laws of the land. Second, the failure of the Court to acknowledge the widely accepted legal principle that the threat of violence (through the building of nuclear

arsenals) is the same as the use of violence.

Prof. Clark responded that despite its shortcomings, the World Court is the best forum available for small nations to influence the opinions of the larger world.

A participant asked whether the Court's opinion lacked weight because it was not unanimous. Prof. Clark responded that there is rarely a unanimous verdict from the Supreme Courts of great powers, and that concerned citizens should never wait for resounding pronouncements from the courts on important matters. The ambiguity in court decisions can even be useful to help clarify the important issues that must be returned to the political arena, where true resolution is possible. He said that one had to be realistic about what could be achieved through the courts. "At best, a legal challenge will be a marginal victory, which may act like water dripping on a stone -- after a lot of dripping, the stone might work loose."

A participant stated that the Opinion imposed a long list of conditions to the use of nuclear weapons which is essentially impossible to meet. That the weapons not indiscriminately target civilians is a case in point. "What kind of weapons are we talking about here?" she asked.

There followed a spirited discussion of the Court's narrow interpretation of the Geneva gas protocol and a debate on whether the case might help shift power from the UN Security Council to the General Assembly. Participants also shared opinions about the power of customary law, and whether small nations had to voice their objections continuously for their silence not to be construed as assent to the activities of large, nuclear states.

Concluding this session, the Chair asked those assembled to focus the following day on two unanimous aspects of the Court opinion: section D calling for compliance with humanitarian law and section F obliging states to undertake meaningful negotiations. He also asked participants to consider whether Canada could now remain loyal both to international law and to its military alliances.

SESSION 2: NATO/ALLIED NUCLEAR POLICY AND THE WORLD COURT RULING

Presenters:

Commander Robert Green RN (retired), current Chair of World Court Project UK.

Yves Le Bouthillier, Professor of International Public Law and International Protection of the Person, University of Ottawa.

Chairperson: Judith Berlyn

Commander Robert Green began by saying that NATO's nuclear doctrine has been revised

twice since the end of the Cold War, most recently in June, 1996. These changes were adopted in a climate more secretive and vague than before. Cdr. Green's information on both changes in the doctrine (dubbed MC 400 and MC 400/1, which remains classified) comes largely from off-the-record briefings with anonymous NATO and national officials over the years.

NATO asserts that it will maintain nuclear weapons "for the foreseeable future." They justify their stand by the logic that nuclear weapons play a stabilizing role and prevent the rise of new aggressor states. Although there will be fewer nuclear weapons, those that remain will be deployed in a more flexible way. Cdr. Green said he is perplexed and troubled by the statement from the British Foreign and Commonwealth Office that "NATO's strategy of war prevention, including its nuclear element, is essential to the process of forging new relationships with Russia and other East European countries."

As in the past, NATO refuses to rule out a "first strike" or commit to using nuclear weapons only as a "last resort", said Cdr. Green. What has changed is that NATO is developing a new "adaptive targeting capability" allowing for possible targets to be chosen by computer at the last moment. This will make it more difficult to maintain political control over nuclear weapon use under all circumstances.

So called "sub-strategic" nuclear weapons would likely be the ones used for adaptive targeting. Cdr. Green warned against viewing these weapons as more benign than strategic nuclear weapons, stating that a new "low-yield" submarine-based nuclear bomb, for instance, has eight times the yield of the Hiroshima bomb. The indiscriminate nature of these devices means they are not military weapons but militarily useless. "They are delayed action biological terror devices which also explode with devastating power," he said.

What also has changed is NATO's perception of the source of its enemies. Today, the alliance believes its enemies originate from North Africa, and the near- and Middle-East, outside NATO's traditional European terrain.

At this point in his presentation, Cdr. Green focussed on the strategic designs of nuclear powers within NATO, and conveyed his concern about the new bilateral arrangements between the US, UK and France. Cdr. Green believes these might have worrying implications on the non-nuclear NATO member states. In 1992 the UK and France established a Joint Commission on Nuclear Policy and Doctrine. The Commission was driven by the debate on a common European Union security policy and the belief that nuclear capability was essential to the maintenance of Security Council membership. In 1995, the UK and France agreed that they would fire a "low-yield" nuclear warning shot if either's "vital interests" were threatened. The implications being that such a threat could be made even against a non-nuclear state, notwithstanding British and French negative security assurances. The 1995 British Defence White Paper defined these vital interests as sea routes, the supply of raw resources and British investment overseas.

Meanwhile, the United States also advanced an agenda for "nuclear gunboat diplomacy"

in its 1994 US Nuclear Posture Review. The review calls for a "Nuclear Expeditionary Force... primarily for use against China or Third World targets." There have been reports that the Pentagon is testing computer models enabling the US to aim nuclear weapons against Third World targets, in addition to developing a "bunker buster" or "micro-nuke" for use in a regional conflict. Cdr. Green points out that these new weapons would release massive radioactive fallout.

Cdr. Green expects that all NATO members would participate in these plans, since nuclear acquiescence is considered "the litmus test of loyalty". Already, member states such as Germany, Italy and Belgium are providing homes for the building of a new generation of "vaults" to house nuclear weapons beneath aircrafts under the floor of hardened aircraft shelters. These would increase weapon survival in an attack, allow for aircrafts to be armed more quickly, and avoid the vulnerable movement of weapons from remote storage igloos to aircrafts.

Cdr. Green believes the World Court advisory opinion challenges the following aspects of NATO's nuclear weapons policy:

- Plans to protect "vital interests" and to strike non-nuclear states and so-called rogue states;
- NATO's persistence to keep open "first use";
- 'Nuclear deterrent' patrols carrying weapons so powerful that it would be impossible for them not to be indiscriminate as required by humanitarian law;
- The Nuremberg Connection;
- The underlying principle that "nuclear might is right";
- NATO's nuclear umbrella doctrine;
- The planned use of "bunker busters" which would create the kind of environmental damage that should put nuclear weapons in the same stigmatized category as biological and chemical weapons.

Cdr. Green concluded that the development of new weapons such as "bunker-busters" is NATO's attempt to create "jobs for nukes" rather than to pursue its obligation to negotiate nuclear disarmament.

The Chair then introduced the second speaker, **Professor Yves Le Bouthillier**. Prof. Le Bouthillier elaborated on the substance of NATO's policy, specifically MC 400/1, by referring to comments published in February 1997 by a member of NATO's planning committee. These were intended to "dispel myths about NATO's nuclear position." The NATO official said that

although the risk of nuclear confrontation is diminished with the post-Cold War reduction in the number of weapons, NATO is concerned about the possible proliferation of nuclear weapons in North Africa. The official also remarked that observers were wrong to think that NATO's expansion in to Eastern Europe would lead to greater numbers of nuclear weapons or pose a greater threat to Russia. Since NATO refuses to provide a written guarantee that it won't use nuclear weapons against Russia, however, it has done little to diminish Russian fears, said Prof. Le Bouthillier. He added that what is known of NATO's plans "leads us to be sceptical."

Although NATO needs to study and take into account the World Court Advisory Opinion, it has so far shown a "disturbing" indifference towards it. A December 1996 news release, for instance, reaffirmed NATO's nuclear policy and ignored the Opinion. NATO's position -- that the decision is not binding because it is only an Opinion -- is not valid, Prof. Le Bouthillier said, since an Opinion per se could only be expected in a situation where nuclear war is imminent.

Canada must also study the Opinion and clarify its policy. To do this, she should keep in mind key elements of the Advisory Opinion:

1) The Court said that the Advisory Opinion ought to be considered as a whole, not as component parts. Dissenting views should also be considered, since they could help interpret the whole document.

2) The Court dealt mostly with principles and did not address specific scenarios. This leads to different interpretations of the Opinion.

The most common interpretation is that the Court determined that the use of nuclear weapons is illegal but could not determine if this remains true when the existence of the state is threatened. This ambiguity stems from the Court's inability to decide whether humanitarian law or the recognised right of states to survive is the foremost consideration. In the absence of international opposition, states have been left free to act as they see fit. The Court, however, did not equate state silence on the matter with acquiescence.

Prof. Le Bouthillier, in the interest of nuclear disarmament, warned against taking the matter to the International Law Commission for clarification. NATO would surely attempt to influence the decision in its favour, and success by nuclear states would clearly reverse the momentum that is now on the side of states that want to ban nuclear weapons.

Other serious questions remain around the meaning of "the survival of the state". This concept originated in the 19th century and has profound implications. It was refined in 1945 to refer more narrowly to extreme situations of self-defence.

Questions raised by the concept include the following: What threat to the state would justify the use of nuclear weapons? Could Kuwait have used nuclear weapons against Iraq? Could Iraq use nuclear weapons if it is attacked by an ethnic group such as the Kurds, from a

neighbouring state? Could a non-nuclear state under the "nuclear umbrella" of its allies invite a nuclear strike on its behalf? And, could nuclear weapons be used in response to an anticipated threat to survival of the state?

Prof. Le Bouthillier said that despite the uncertainty about specific scenarios, the Court's invoking of survival of the state makes many uses of nuclear weapons illegal. The British threat to use nuclear weapons to protect overseas investments and raw materials is, for example, in contradiction of the opinion. He cited a lawyer who believes that the defence of survival of the state would not justify any of the incidents in the past 50 years when a nuclear strike was either carried out or threatened.

The NATO official, however, did not recommend that NATO be pushed to sign a guarantee that nuclear weapons only be used when the survival of the state is at stake, because this would legitimize the existence of its nuclear arsenals and the alliance's position that their nuclear weapons are merely defensive.

The second, less common interpretation of the Opinion is that nuclear weapons can be used not only when the survival of the state is at stake, but also when their use would be in keeping with humanitarian law. For instance, said Prof. Le Bouthillier, this interpretation might have justified a nuclear retaliation if chemical weapons had been used against troops in the Gulf War. The problem with this interpretation, he added, is that the Court gave no indication of what the threshold of horror would have to be to justify this action.

The professor also said that he regrets that the Court, by not referring to the development of new nuclear weapons, has left the door open to the deployment and use of supposedly "clean" nuclear weapons. Nuclear states could argue that these could be used within the constraints of humanitarian law. Since the development of new generations of such "clean" nuclear weapons would likely spur a nuclear arms race, they could heighten the possibility of proliferation and the actual use of nuclear weapons.

In this context, Prof. Le Bouthillier suggested that the principle of "reasonable possibility of persecution" that exists within refugee law ought to be extended to allow humanity the benefit of living in a world in which nuclear arms are illegal. There is a reasonable possibility that if a limited nuclear exchange is allowed to escalate just once, life on this planet may end, he explained.

Question/Discussion Period

Following the presentations by Cdr. Green and Prof. Le Bouthillier, participants observed that the World Court has not delivered an outright ban on nuclear weapons. A partial or qualified ban is in many respects more complicated. Raising these issues in our culture involves not only informing and educating the public, but also rethinking our values. The Vatican II declaration that "there are no just wars" is important in this respect. Delegates expressed concern that some

organizations founded specifically to work for nuclear disarmament are now broadening their focus to issues of "human security", yet nuclear weapons remain an exceptional threat worthy of special attention.

Prof. Le Bouthillier responded that the Court seems to have disregarded the risks of "leaving the door open" to nuclear weapons. He noted that the judges most strongly opposed to any use of nuclear weapons drew on a range of ethical traditions to support their views. In contrast, those most inclined to accept the legitimacy of nuclear weapons, focussed on the practical question of whether nuclear threats actually work as a deterrent.

In answer to a question about the composition of NATO's Nuclear Planning Group, it was explained that all current NATO members, with the exception of France, are represented, and that new members in an expanded NATO would have the right to participate as well. Cdr. Green noted that information on discussions and decisions made in the group's twice-yearly meetings is extremely limited. He expressed his concern that a two-tier nuclear planning structure may emerge, with nuclear weapons states on one tier and remaining NATO members on the other.

A participant suggested that NATO's failure to respond to the Court Opinion opens the way to further legal action, and that principles that have become important in addressing environmental issues may prove useful in this context. These include the "precautionary" and "reverse onus" principles, the duty to prevent disasters, the exercise of "responsible care", and so on, deriving either from customary international law or international declarations.

Cdr. Green noted that the British position, based on consultations with NATO partners, is that the World Court decision introduces no new factors in the determination of nuclear policy, since it does not prohibit the use of nuclear weapons per se. He remarked that it strains credulity to suggest that in a crisis situation anyone will actually sit down and weigh the legal implications of all the circumstances. Rules must be established beforehand. Reverse onus is relevant here: the burden has shifted to the nuclear powers to explain under exactly what circumstances the use of nuclear weapons would be justified.

Prof. Le Bouthillier observed that the Court did identify an obligation to negotiate in good faith for nuclear disarmament, and that Canada's obligations must be re-examined in that light. He noted that the Court made no reference to the precautionary principle, and that, in general, it is a weakness of the Opinion that it is highly compartmentalized, with laws governing the use of force, environmental law, humanitarian law, and so on, all treated independently. The environmental impact of nuclear weapons would extend far beyond the duration of a state of war, and therefore cannot be justified in terms of military necessity.

A participant expressed disappointment that the Court had not made more use of the reverse onus and precautionary principles, which are critical from the perspective of the small Pacific states, both in relation to nuclear weapons and to global warming.

In answer to a question on the link between NATO policy and the Non-Proliferation Treaty

(NPT), it was pointed out that the Court did not see any contradiction between NPT accession and possession of nuclear weapons. The nuclear weapons states argued before the Court that the NPT actually legitimizes the possession and possible use of nuclear weapons. The Opinion did stress that the NPT imposes an obligation on the nuclear powers not merely to limit their use of nuclear weapons to "legitimate" purposes, but to negotiate nuclear disarmament.

A participant asked if the Opinion creates a new principle of international law by concluding that a threat to the survival of a state might justify the use of nuclear weapons. The right of self-defence already exists, but is subject to humanitarian law. Is its scope being broadened to a less conditional right of state survival?

Prof. Le Bouthillier agreed that the Court's introduction of state survival and "extreme circumstance", without clearly stating that humanitarian law still applies, is a trap that must be rejected. Dissenting judges objected that state survival was being placed above international law, conferring on states the right to wipe out the rest of humanity to ensure their own survival, or even by extension, to protect their "vital interests". It could also be used to justify the use of nuclear weapons by a state against its own people.

The nuclear powers should be pressed to state explicitly that the exercise of such a right is constrained by humanitarian law. It was reported that Britain plans to produce a revised military manual of law which will take the World Court opinion into account. This will be a significant test, since it is adherence to law that distinguishes military professionals from "hired killers".

It was noted that the International Covenant permits the derogation of fundamental rights when the existence of the nation is threatened. While this has been extensively used and widely interpreted by states, it does not permit suspension of the right to life. The Nuremberg principle -- that international law may not be violated to win a war -- was disregarded by the majority of the Court, as was the Human Rights Committee declaration that nuclear weapons violate human rights.

Cdr. Green noted the British Foreign Office contention that the Court Opinion does not affect the use of nuclear weapons for collective self-defence i.e. use by one state to ensure the survival of another.

Pointing to the potentially destabilizing effects of NATO expansion, particularly the danger of undermining Russian support for START II and of promoting European rearmament, a participant stressed the need for an effective counterweight to NATO. Cdr. Green agreed that if nuclear weapons are to be eliminated, alternative security arrangements must be developed. The Organization for Security and Co-operation in Europe (OSCE) provides a potential framework, if it is strengthened and given a leadership role to which NATO military policy would be subject. This has been proposed by various actors in Europe. Although the OSCE has acted on crises, like Chechnya and Albania, which NATO has been unable to address, it has extremely limited resources. This may be an area for Canadian initiative.

It was suggested that the application of external standards under international trade law rests on a principle that should also apply here: that it can not be left to any one state to define the circumstances under which use of nuclear weapons is warranted. The validity of the practice of invoking "national security" to justify breaches of international trade rules is currently being challenged within the World Trade Organization.

SESSION 3: APPLYING THE WORLD COURT RULING TO CANADA

Presenters:

Peter Weiss, American peace activist, practicing lawyer and law professor. Current Co-chair of the International Association of Lawyers Against Nuclear Arms (IALANA).

Scott Fairley, Practicing lawyer. Past President of the Canadian Council of International Law.

Chairperson: Janis Alton

Professor Peter Weiss began by highlighting several aspects of the World Court Opinion:

- It emphasizes the unique character of nuclear weapons -- that the direct impact of a nuclear explosion is vastly more destructive than is the case with other weapons, and the indirect effects are uncontainable in time or space.

- It states that although the proportionality principle may not preclude the use of nuclear weapons in every circumstance, their use must come under the laws of armed conflict, and hence humanitarian law.

- It makes no distinction between the use and threat of use of nuclear weapons.

- It notes the emergence of norms indicating the prohibition of nuclear weapons, contradicting the contention of the nuclear powers that the existence of the Non-Proliferation Treaty and Nuclear Free Zones actually legitimizes their possession/and possible use of nuclear weapons.

Prof. Weiss noted that the "elementary conditions of humanity" that are at the centre of humanitarian law require that the rule of law continue to apply in situations of armed conflict. This principle is almost universally acknowledged, as demonstrated by the broad accession to the Hague and Geneva Conventions. He advanced the proposition that the various principles of humanitarian law and laws of armed conflict are not fungible -- states may not, for example, use the principle of necessity to justify an act that the principle of unnecessary suffering proscribes.

This is what the nuclear weapons states have sought to do, to which the Court appears to have opened the door. "Exceptional circumstance" and "state survival" cannot be used to justify the use of nuclear weapons in any conceivable circumstance.

The position taken by the nuclear weapons states is that they accept the principles of humanitarian law, and will only use nuclear weapons in self-defence. They also insist that the World Court Opinion, as an Advisory Opinion, is not binding. Since the Court is the highest forum for the interpretation of international law, this is tantamount to saying that international law may be ignored.

Prof. Weiss suggested that the implications of the Opinion for Canada should be examined in the context of Canadian involvement in nuclear war preparations:

- Canada's role in NATO's Nuclear Planning Group -- although this is impossible to assess, since we don't know what happens in Planning Group meetings;

- Canadian participation in NORAD, which clearly gives Canada a role in determining when a nuclear strike/retaliation is to be triggered;

- A variety of other Canadian roles, documented in the background paper by Bill Robinson documents a variety of other roles;

- The "war reservation" attached to US adherence to the Non-Proliferation Treaty, under which Canada could be given direct control of American nuclear weapons in a war situation.

Mr. Scott Fairley began his presentation by situating the World Court Opinion in the context of Canadian domestic law. He contended that to the extent that the Opinion confirms customary norms in international law regarding the use of nuclear weapons, these also form part

of Canadian law, and can be applied by Canadian judges unless overridden by an explicit declaration of the Parliament or Government of Canada.

The Canadian Constitution presents both opportunities and limitations in dealing with nuclear weapons. Since patriation, the Constitution is now the supreme law of the land. While it does not expressly forbid Parliament from violating international law, the Supreme Court has found (in the 1980's Operation Dismantle case on cruise missile testing) that actions of the Minister of Defence and the Minister of Foreign Affairs are subject to review under the Constitution.

Mr. Fairley suggested that Ottawa is clearly the arena for the nuclear issue. The federal government has unilateral power to deal with defence, and has paramountcy even over "provincial" issues like health, when national interests are clearly at stake.

Efforts to invoke the Charter of Rights and Freedoms in relation to nuclear weapons face a significant hurdle. In the Operation Dismantle case, the Supreme Court ruled that the threat posed by cruise missile testing to rights such as the right to life, was too remote to be challenged under the Charter. It also found that the case involved foreign policy issues that were beyond the Court's scope and therefore non-justiciable.

The Secretary of State for Foreign Affairs has referred the World Court Opinion to the Standing Committee on Foreign Affairs and International Trade. He appears to be taking the position that it is an Advisory Opinion, and as such is a matter of policy, not law.

For the same reason, the federal government is unlikely to put a reference case -- as it could do -- on the legality of nuclear weapons before the Supreme Court of Canada.

Mr. Fairley suggested that using the legal route is an expensive and risky way to establish the significance of the World Court decision for Canadian policy. Resources might be better invested in the political sphere, in the form of a lobby campaign.

Question/Discussion Period

In response to Mr. Fairley's presentation, it was noted that a distinction must be made between the applicability of law and the possibility of litigation. The role of legal action in de-legitimizing current policy was underlined, particularly given the current government's commitment to support and expand the application of the rule of law in international affairs. An opinion on this issue by the world's highest authority on international law should be embraced as an important step in the development of the rule of law. It was pointed out that the use of legal institutions is not an end in itself, but rather one instrument to achieve what will ultimately be a political decision that will be based as much on military and strategic factors, economic interests and public opinion, as on legal arguments.

Mr. Fairley agreed on the need for a legal approach to policy making. The government has put the question on the agenda of the Standing Committee. That is the place to start, with a legal argument that Parliament must ensure that Canadian policy is adjusted to conform with customary international law. While there is a legal issue here, political institutions may be a better place to deal with it than judicial institutions. It was agreed that at a minimum, the Canadian government should be pressed to formally respond to the World Court Opinion..

It was suggested that NATO policy appears to be a contravention of the legal obligation, identified in the Court opinion, to conduct good-faith negotiations leading to the conclusion of a nuclear disarmament treaty. It was also noted that Canada has attached a reservation to its

accession to Additional Protocol I of the Geneva Convention, stating that it does not interpret the Protocol as applying to nuclear weapons. While it was acknowledged that the reservation has no effect on pre-existing Canadian commitments, some participants stated that it would be an important symbolic gesture for Canada to withdraw the reservation, in light of the World Court Opinion, and to urge other states to do likewise.

On the issue of "binding" versus "advisory" opinions, it was pointed out that advisory opinions should not be lightly dismissed -- the UN General Assembly did ask for the Opinion, and did not subsequently declare, as it has with some other World Court rulings, that political factors outweigh legal considerations. The Opinion is about customary legal norms that have, in fact, been implemented and ratified by Canada. Furthermore, some areas of international law are binding by definition -- the Canadian parliament can not legally authorize torture, why should it be able to authorize the use of nuclear weapons?

Although Canadian legislation authorizing NATO membership does not make reference to nuclear weapons, it was generally agreed that the Court's findings on the effects of such weapons have strengthened the case for a Charter challenge to Canadian participation in NATO and other nuclear war-related activities. With the Opinion, these issues have become more justiciable than the Operation Dismantle case. Since the government has no interest in referring the issue to the Supreme Court, the challenge is to find a plaintiff that the Court will agree to hear. On this front, recent trends have been unfavourable, with the Supreme Court becoming increasingly restrictive in granting standing to public interest groups.

SESSION 4: CONCLUSIONS AND LOOKING TO THE FUTURE

Presenters:

Tom Keating, Professor of Political Science, author of "Canada and the World Order" and "Canada, NATO and the Bomb", member of Project Ploughshares.

Douglas Roche, former Canadian Ambassador for Disarmament, former Chair of the UN Disarmament Committee, founding president of Parliamentarians for Global Action, and author of numerous books.

Chairperson: Joanna Santa Barbara

Professor Tom. Keating began by commenting that NATO today is at an interesting juncture in its history, with a recent decision made "from the top down" to take NATO's nuclear mandate into the emerging era. He reminded the seminar participants that Canada had pushed for the founding of NATO to manage European affairs and counterbalance US influence, and that it had voiced strong reservations about the body going nuclear in the 1950s. He continued by stating that the time is ripe for a decision "from the bottom up" on whether and how NATO can serve the interests of peace.

The decision to carve out a new role for NATO's nuclear arsenal "has no political or strategic justification -- in fact, it poses a threat," he said.

The situation today is quite different from that of the 1950s, according to Prof. Keating. In that era, there were no institutions to manage European affairs, so Canada pushed for the formation of NATO to counterbalance US influence. Today, there are other organizations that compete for that role. The OSCE was touted as a forum for managing European Affairs in 1991-92, but has unfairly lost some of its prestige in the wake of the Yugoslavia debacle. Prof. Keating thought that the OSCE should be revived.

The security situation today is the reverse of what it was forty years ago. A nuclear-equipped NATO came into being to offset the Soviet Union's conventional weapons superiority in the 1950s, but today the Russian military is in disarray and the country spends only one-tenth of what the US spends on its military. The Russian nuclear arsenal does remain, but that is best dealt with through incentives for Russia to move away from a first strike policy. In addition, a current threat to European security is the internal break-up of states, which NATO is unequipped to deal with.

The enlargement of NATO to include Eastern European states is highly likely, and potentially disastrous if this move serves to isolate Russia. There is an urgent need for political and economic engagement to persuade Russia to eliminate its nuclear arsenal.

Also highly troubling, said Prof. Keating, is NATO's determination to move "out of area" -- that is, out of Europe and into the Third World. Canada has historically insisted that NATO restrict its activities to Europe. In fact, Lester B. Pearson responded years ago to John Foster Dulles' policy of "massive retaliation" by saying that nuclear weapons had no role in regional conflict.

We are now seeing a radical reworking of NATO's mandate. By moving the deterrence strategy into new areas of the world and extending the role that nuclear weapons can play, NATO is undermining the Non-Proliferation Treaty and legitimating the use of nuclear weapons in regional conflicts. "Micro-nukes" in particular, "put out the message that nuclear weapons are usable, and increase the tendency to want to use them," said Prof. Keating.

Prof. Keating concluded that although it is certain that there will be conflict in the Middle-East and Africa in the future, there is no reason to create the conditions for those conflicts to go nuclear.

The Chair next introduced speaker **Ambassador Douglas Roche**. Ambassador Roche summarized the various points of consensus of the seminar. These were:

- The ICJ Opinion has determined that the use and threat of use of nuclear weapons is constrained by humanitarian law.

- The Opinion has shifted the burden of proof of the legality of nuclear policies onto the nuclear states.

- Lawyers and judges are "nitpicking" the finer points of the decision. The ICJ demanded a conclusion of negotiation on nuclear disarmament. The problem now is there is no enforcement of their decision so it has returned to the political arena. Citizens must press their governments to accept their obligations under international law and to pursue in good faith negotiations towards nuclear disarmament.

- The ICJ Opinion has required the international community to negotiate a convention for the complete elimination of nuclear weapons. As a consequence, the nuclear abolition movement is now legitimized. Ambassador Roche stated, "it is not a dream, it is a commanding reality in light of current international law."

- Despite the ICJ Opinion, the nuclear powers and NATO continue to ignore or flout international law.

- The legal obligations resulting from the ICJ Opinion must take political form. We need systematic progress toward nuclear disarmament defined within a comprehensive framework.

In his concluding comments Ambassador Roche proposed that the Canadian government review the Nuclear Weapons Convention which will be released during the NPT PrepComm; immediately ask for clarification of NATO's policy, seek a formal public debate on this issue and push to form a coalition of like-minded states to press for the comprehensive negotiations demanded by the ICJ.

Question/Discussion Period

The Chair then opened the floor to discussion. One participant said Canada should be encouraged to take the same creative approach to nuclear disarmament as it has to the elimination of landmines, by first trying to deal with practical issues such as inspection and de-targeting. She added that Canada has been a leader on "socio-political elements" such as devising confidence-building measures between combatants. Today, it could host nuclear and aspiring nuclear nations to talk about the concerns and fears that drive their policies.

Cdr. Robert Green asked Prof. Keating how he would interpret the British Foreign Office assertion that NATO's nuclear capacity "is essential to the process of forging new relationships with Russia." Prof. Keating responded that the statement made no sense to him, since the key to diffusing the Russian nuclear threat is to diminish the sense of threat that Russia itself feels. He added that the current strategic situation means the west can now afford to offer incentives to Russia for new co-operative ventures.

A participant suggested that Canada could play a role in reviving the OSCE. Prof. Keating added that a benefit of the OSCE over NATO is that it includes Russia.

A representative of Canada's Department of Foreign Affairs told delegates that Canada has acted in good faith and that it takes the ICJ Opinion very seriously. He interpreted the unfolding of the Malaysia initiative differently from Ambassador Roche, and said that this conference had failed to note the achievements of START.

Ambassador Roche responded that the positive initiatives of the Canadian government are appreciated. He continued discussion of the Malaysia initiative, and reiterated his opinion that the START talks were inadequate. Despite the advances under START, he said, there will still be 13,000 nuclear weapons in the year 2003, while NATO expansion plans threaten previous arms control agreements with Russia.

The Canadian government representative added that he was also disturbed by an apparent lack of unanimity among the judges of the World Court and the participants at the Ottawa meeting. He questioned whether Ambassador Roche's summary was representative of the views of the group. He also referred to Prof. Le Bouthillier's quote from the Court decision -- the phrase, "neither a red light nor a green light" -- to suggest that the Court was ambiguous in its ruling.

Prof. Le Bouthillier clarified that the remark, made by one of the judges, referred to a specific legal argument, and that the judge was adamant about the illegality of nuclear weapons. Several delegates pointed out that the Court had ruled unanimously on some key questions, notably the need for the use of nuclear weapons to conform to humanitarian law, and the legal obligation to negotiate in good faith for comprehensive nuclear disarmament.

In response to the suggestion that Ambassador Roche's summary did not reflect the opinion of the meeting, there were no words of dissent when participants were asked if they disagreed with any of the points Ambassador Roche had made.

A participant asked if Prof. Keating and Ambassador Roche believed that Canada should get out of NATO. Prof. Keating replied that although he was worried by NATO policy, he believed that leaving the alliance would diminish Canada's stature and impair its ability to use its influence in other areas, such as landmines. "We could make a principled stand and get out of NATO, but would it be worth it?" he asked.

Ambassador Roche took a different approach. Although he said he does not favour leaving NATO at this time, he added that "if at some point -- after re-examination -- NATO affirms its position, it becomes a question of conscience, where we either follow international law or the policy of NATO."

Responding to a remark about the gulf between NATO's public relations image and its

actual policy, Prof. Keating noted the need to increase public awareness of the alliance and its policy.

There was further discussion of issues such as the need to pursue not just nuclear disarmament but a peace agenda, and the Canadian government's consultation process with the non-governmental community. Following this, Dr Santa Barbara thanked participants and panellists and adjourned the meeting.